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In the Supreme Court of the United States

OCTOBER TERM 1963

No. 819

IRVING MARDER,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

APPEAL FROM THE SUPERIOR COURT
OF SUFFOLK COUNTY, MASSACHUSETTS

JURISDICTIONAL STATEMENT

IRVING MARDER
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Opinions Below

The decision of the Massachusetts Supreme Judicial Court was made on November 4, 1963 and is reported as follows:

Commonwealth v. *Irving Marder*, (1963) Mass. Advance Sheets 1051 to 1054 Inclusive, 193 NE 2d 695 to 697. (See Appendix p. 14).

Jurisdiction

1. This appeal relates to a parking fine exacted pursuant to the following Massachusetts Statutes: General

Laws Chapter 90 § 20, General Laws Chapter 90 § 20A. (See Appendix p. 19-21).

Appellant challenged the validity of these Statutes as being repugnant to the Constitution of the United States, with respect particularly to Amendments VI and XIV. The Massachusetts Supreme Judicial Court decided in favor of the validity of these Statutes.

2. The judgment sought to be reviewed was made on November 4, 1963. Thereafter on that date a rescript was sent to the Suffolk County Superior Court for Criminal Business stating "Exceptions overruled". On November 26, 1963 the said Suffolk County Superior Court imposed sentence. The Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of Court of said Suffolk Superior Court for Criminal Business on December 18, 1963. (R. 7-11)

3. Appellant believes that the statutory provision conferring jurisdiction of his appeal upon this Honorable Court is:

28 U.S.C.A. Section 1257 (2)

4. The following cases are believed to sustain the jurisdiction of this Court:

A. To establish that the remedy is by appeal:

Chicago and Northwestern Railway Co. v. *Nye, Etc. Co.*, 260 U.S. 35; *Missouri Pacific Railway Co.* v. *Tucker*, 230 U.S. 340; *De Jonge* v. *Oregon*, 299 U.S. 353; *Jamison* v. *Texas*, 318 U.S. 413; Case = 29 *Nichols* v. *Mass.*, within *Schneider* v. *State*, 308 U.S. 147.

B. To establish the substantiality of this case:

Chicago and Northwestern Railway Co. v. *Nye, Etc. Co.*, supra; *Missouri Pacific Railway Co.* v. *Tucker*,

supra; *Cotting* v. *Kansas City Stock Yards*, 183 U.S. 79, 101, 102, 106; *Schneider* v. *State*, supra; *DeJonge* v. *Oregon*, supra; *Raley* v. *Ohio*, 360 U.S. 423, 438, 439; *Thompson* v. *Louisville*, 362 U.S. 199, 203.

5. The verbatim texts of the statutes involved in this case are set out in the Appendix and are to be found in the official edition as Massachusetts General Laws Chapter 90 § 20, § 20A (See Appendix p. 19)
Rules of the Boston Traffic Commission (App. p. 20)

The Questions Presented

Are the Massachusetts General Laws, Chapter 90 Sections 20A and 20 invalid as repugnant to the Constitution of the United States:

A. *Under Amendment VI*, in that, for the same substantive offence, they subject a defendant insisting on trial to a maximum $25.00 fine; whereas they subject a defendant not insisting on trial to a maximum $3.00 fine, thus *effectively* denying a right to trial?

B. *Under Amendment XIV*, as denying Equal Protection of the Laws:

1. In that they subject a defendant insisting on trial to a criminal record and probationary requirements, whereas they insulate a defendant not insisting on trial from such record and probationary requirements?
2. In that they subject two defendants who have allegedly committed the same substantive offence to two greatly differing standards of maximum penalties:

a. even though these two defendants cannot be differentiated or logically classified at or before the time of the commission of the alleged offenses, and

b. even though said statutes attempt to classify these two defendants for different penalties at the time of, and on the basis of, their choosing whether or not to demand trial?

C. *Under Amendment XIV*, as depriving persons of liberty and property without Due Process of Law:

1. In that they intimidate persons from insisting on trial, coerce confessions, and otherwise effectively remove from defendants an important phase of legal process, namely trial?
2. In that they fail to state clearly and unequivocably a defendant's maximum penal exposure at or before the time of the commission of his alleged offence?
3. In that they are vague as to their application?

Statement of the Case

Defendant in October of 1961, was owner of an automobile which was parked in a space on Billerica Street, downtown Boston. A Boston police officer reported that this automobile was parked overtime at that place. Thereafter defendant was issued a summons to answer to the complaint stemming from this alleged overtime parking violation. (R. 4).

In due course defendant pleaded "Not Guilty" in Boston Municipal Court when arraigned. Trial took place in said Court and defendant was adjudged "Guilty". He was fined $25.00. Thereupon he appealed for trial *de novo*

and was bailed pending further proceedings in the Superior Court. (R. 5).

In January of 1962 defendant moved in Superior Court for dismissal of his case, as a matter of law, contending that the penalties to which he could be subjected, if convicted of the offense charged, were unconstitutional. It was at this point and in this manner that the constitutional questions were first raised. The salient portions of said "Motion to Dismiss" are set forth as follows:

> "Now comes the Defendant and moves that the Honorable Court dismiss, quash and abate this action for the following reasons:
>
> > "1. Under the regulations . . ., under powers set forth in G.L. C. 90 §§ 20 and 20A, defendant is placed in a position where he may suffer a greater penalty if he insists on a hearing and judicial determination of guilt than if he confesses guilt. This is unequal treatment under the law and therefore unconstitutional.
> >
> > . . ., with respect to the offense here charged he would be exposed to a maximum fine of $3.00, if he accepted non-criminal disposition of his case; whereas he would be exposed to a maximum fine of $25.00 . . . if he insisted on a hearing and judicial determination of guilt.
> >
> > "2. Under G.L. C. 90 § 20 and § 20A, he must bear the onus of a criminal record if he is found guilty of violations after insisting upon a hearing and judicial determination of guilt; whereas he bears no criminal record if he confesses guilt. This is unequal treatment under law and unconstitutional.

"3. The discriminatory treatment under law . . . of G.L. C. 90 § 20 and § 20A effectively intimidates defendant from insisting upon trial . . .

"4. . . . To endorse such double standard here would be a whittling away of . . . individual rights long recognized under our constitutional form of government.

"5. A fine or penalty should be based upon the nature of the offense committed, and not upon the nature of the judicial method . . . for determination of guilt, . . . the statutes giving rise to such violation of a long accepted principle of justice are accordingly unconstitutional.

Wherefore defendant prays . . . that this action based on invalid statutes be dismissed, . . ."

His Motion was denied without opinion by Donahue, J., to which denial he took due exception (R. 1, 6).

Thereafter defendant was tried without jury and was again found "Guilty". Sentence was imposed comprising a fine of $25.00 with stay of execution pending appeal, bail continuing. (R. 3).

A Claim of Appeal under G.L. C. 278 § 28 was duly filed (R. 3). Ultimately defendant's "Substitute Bill of Exceptions" based on the denial of his "Motion to Dismiss" was filed and allowed by Donahue, J. (R. 7). After argument before its full bench, the Massachusetts Supreme Judicial Court overruled Appellant's exceptions and did not act favorably to him on his appeal. On November 4, 1963, the Supreme Judicial Court sent a rescript "Exceptions overruled" to the Suffolk County Superior Court for Criminal Business, which Court, on November 26, 1963 imposed upon,

and exacted from Appellant the $25.00 fine. Had Appellant not paid the fine at that time, he would have been subject to 25 days' imprisonment (R. 7, 8)

How the Federal Questions Were Raised

As the Massachusetts Supreme Judicial Court stated in its opinion, "The (Appellant's) motion asserted that the statutes . . . unconstitutionally denied him the Equal Protection of the laws and Due Process of Law . . ."

As earlier stated, it was in this fashion, in Appellant's *Motion to Dismiss*, heretofore set forth, that Appellant first raised the Federal Questions.

Faced with the fear that the opinion of the Massachusetts Supreme Judicial Court, as written, might leave ambiguous the question as to whether its decision was made in contemplation only of the Massachusetts Constitution and not of the Federal Constitution, Appellant requested and succeeded in procuring from that Court a letter, appended hereto, clearly stating that the decision was made in contemplation of Federal Constitutional provisions. (App. p. 18)

Honeyman v. *Hanan*, 300 U.S. 14, 23.

It is to be noted that the words "Equal Protection of the laws" and "Due Process of law" which appear in the original opinion of the Massachusetts Supreme Judicial Court are words well known to the Federal Constitution but never found in the Massachusetts Constitution.

Appellant points out also that, in its opinion, the Massachusetts Supreme Judicial Court made careful reference to the case of *Berger* v. *Denver*, 142 Colo. 72, a case which dealt with Federal Constitutional questions including Equal Protection of the law and Due Process of law—a fact which further buttresses Appellant's contention that the said

Federal Questions were adequately raised in the earlier proceedings, thus setting the stage for proper consideration of these questions in this Court.

Bryant v. *Zimmerman*, 278 U.S. 63, 67, 69.

Where a state court of last resort assumes or holds a Federal question is properly before it and then proceeds to consider and dispose of that issue, concern with the proper raising of that Federal question in the state court disappears.

Charleston Association v. *Alderson*, 324 U.S. 180, 185, 186.
Saltonstall v. *Saltonstall*, 276 U.S. 260, 267.
Raley v. *Ohio*, 360 U.S. 423, 436 (1958)

While the opinion of the Massachusetts Supreme Judicial Court does not choose to comment at length on the contentions of the Appellant raised in the original motion (and more specifically in the brief) that the statutes effectively deny him his right to trial guaranteed by the 14th Amendment, and indeed, if anything, takes the position that he has been accorded such trial, Appellant here continues to insist that, on the facts of the case and in the terms of the statutes involved, no such right to free trial was properly accorded him, or could be accorded anyone affected by these statutes and the regulations pursuant thereto.

The Questions Are Substantial

Appellant asserts that the proper remedy is by appeal and that the questions are substantial and deserve the attention of this Honorable Court for the following reasons:

A. To establish that the proper remedy is by appeal, the following cases are cited:

Chicago v. Northwestern Railway Co. v. Nye Etc. Co., 260 U.S. 35(1922); *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340 (1912).

DeJonge v. Oregon, 299 U.S. 353; *Jamison v. Texas*, 318 U.S. 413. Case #29 *Nichols v. Massachusetts*, reported as a companion case within *Schneider v. State*, 308 U.S. 147 establishes, as well as the remedy, the fact that the method of Appeal from a Superior Court in Massachusetts, employed here by Appellant, has previously been effective. In this state, the Superior Court is the Court of record and final Judgment.

It is to be noted that the Writ of Error used before 1928 was the equivalent of Appeal according to *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 288-290.

B. To establish that the questions are substantial:

1.- Appellant contends that the Statutes in question effectively deprive him, and persons similarly situated, of a right to trial. Any suggestion that there is a free trial under these statutes is completely "nominal and illusory".

Wadley Southern Railway Co. v. Georgia, 235 U.S. 651, 661, 663-665 (1915); *Ex parte Young*, 209 U.S. 123, 146, 147 (1907); *Chicago and Northwestern Railway Co. v. Nye Etc. Co.*, 260 U.S. 35, 44-48; (In this case on page 47, there is a summary of the case of: *Missouri Pacific Railroad Co. v. Tucker*, 230 U.S. 340.)

Deprivation of the right to trial is deprivation of a

most basic right, *Ohio Bell Tel. Co.* v. *Public Util. Comm. of Ohio*, 301 U.S. 292, 304, 305 (1936)

2. Appellant further contends that he is denied Equal Protection of the laws in that, in contrast to some other person committing the same substantive offense and otherwise indistinguishable from Appellant at the time of commission of said offense, he is subjected to a different degree of punishment than such other person.

Yick-Wo v. *Hopkins*, 118 U.S. 356, 367, 368 (quoting *Barbier* v. *Connolly*, 113 U.S. 27, 31); *Cotting* v. *Kansas City Stock Yards*, 183 U.S. 79, 101, 102, 106; *Chicago & Northwestern Railway* v. *Nye Etc. Co.*, supra.

3. Appellant contends that he is deprived of Due Process of law.

a. In that, the maximum penalty, to which he was subject, was not defined in advance of, or at the time of, his alleged offense.

b. In that, at the time of the alleged offense, there is no definition which states whether or not the said offense is criminal. The determination of the offense being "criminal" or "non-criminal"[1] is made long after the alleged offense is committed; and, only when a defendant exercises his lawful right to insist on trial does it become "criminal".

c. In that, he was effectively deprived of his right to trial, one of the essentials of Due Process of law, in so far as he was coerced by applicable statutes to plead guilty and accept a $3.00 fine or, in lieu thereof,

[1] Cited by the opinion in appendix p. 16 are the Massachusetts Legislative Documents: Senate # 5, of 1930 and Senate # 125 of 1934 p. 168-171, 220-223 which hold that the basis for Ch. 90 S20A is "the elimination of minor offenses from classification as crimes".

to insist on trial with the danger of a $25,00 fine. "Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid in the 14th Amendment. *Missouri Pacific Railroad* v. *Tucker*, 230 U.S. 340." *Chicago and Northwestern Railroad Co.* v. *Nye et al*, 260 U.S. 35, 47.

The Legislature may deal with the abuses and the offenses *DIRECTLY* but may not curtail the individual rights themselves secured by the Constitution.

De Jonge v. *Oregon*, 299 U.S. 353 (1936); *Schneider* v. *State*, 308 U.S. 147, Case #29—*Nichols* v. *Massachusetts* (1939).

The statutes[2] in question, as interpreted, may be held to employ the curtailment-of-rights methods which were invalidated in *Dejonge* v. *Oregon*,[3] supra, and in *Raley* v. *Ohio*, 360 U.S. 423, 438, 439.[4]

4. Appellant contends that though a difference of $22.00 may seem like a ridiculously small sum to concern this most powerful judicial tribunal in the world, the matter is still not insubstantial. There is clear precedent in this Court for matters in which the sums involved were far less than $22.00.

Jamison v. *Texas*, 318 U.S. 413 (1943)
Thompson v. *Louisville*, 362 U.S. 199, 203 (1959)
Nichols v. *Massachusetts*, No. 29, 308 U.S. 147
Talley v. *California*, 362 U.S. 60 (1960).

5. Even if this court considers that the $22.00 by which Appellant is affected is insignificant and insubstantial, it

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[2] "Convict him on a charge that was never made."

[3] "Convicting a citizen for exercising a privilege which the state clearly had told him was available to him."

is pointed out that the statutes involved and the principles concerned affect many thousands of alleged violators coming before the Massachusetts Courts each year. And, in sum, involve many thousands of dollars . . . again making the matter substantial.

6. Appellant contends that there are similar laws in other states and that a decision in this case might affect the many thousands of people governed by such statutes and might therefore involve many more thousands of dollars annually.[4]

7. While the statutes and decisions in other states are not exactly the same as those involved in this case, they have common features. There is already an apparent divergence of opinion between Massachusetts on the one hand and Colorado on the other in this matter; and it is believed a decision by this Court would tend to get rid of the differences between States in their interpretation of the Federal Constitution as it applies to these matters.

> *Berger* v. *Denver*, 142 Colo. 72 (1960); Denver Municipal Code: Sec. 011. 10; Sec. 521. 1-2; Sec. 522. 2-1; Sec. 522. 2-2.

8. As the Massachusetts Court has stated in the Opinion in this very case: it is holding one way because this is a minor offense and it might very well hold the reverse if there was involved a more serious offense. Appellant considers such a pragmatic approach to be an unfortunate one, and that such variability of interpretation respecting basic Constitutional Rights is insupportable.[5] *Letters* v.

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[4] Warren, "Traffic Courts", page 63, cited by the Massachusetts Supreme Judicial Court in its Decision, deplores a higher-fines for-trial policy as unnecessary, undesirable and poor enforcement practice.

[5] Warren's "Traffic Courts" p. 87, 111, and 49 American Bar Assoc. Journal p. 333-336 April 1963 explain the importance of constitutional justice for traffic case defendants, as crucial to the public economy and safety and to our system of government.

Commonwealth, (1963) Mass. Adv. Sh. 1045-1050, was decided the same day on which the decision in Appellant's case was rendered, was referred to in Appellant's case, and states in part: ". . . a defendant may not be punished for exercising his right to trial and therefore the fact that he has done so should be given no weight in determining his sentence . . . to impose upon a defendant such alternatives amounts to coercion as a matter of law." A lesser punishment was offered to Letters by a judge in return for defendant's acquiescence in foregoing the exercise of his lawful right to trial. In *U.S. v. Wilcox*, 278 F2d 500, 504 (C.A. 7) (1960), a more severe punishment was imposed on a defendant who insisted on his lawful right to trial instead of foregoing it. The decisions in both cases were reversed, it being held that there was, in each of them, a form of coercion. In Appellant's case this same choice is set before him *not* by a judge but by the statutes and regulations themselves. Nonetheless the principle at work is the same: an instrumentality of government is being utilized as a tool to coerce a person into foregoing the exercise of a basic and lawful right.[6]

Conclusion

For the foregoing reasons, this Court should note jurisdiction of the present appeal.

Respectfully submitted,

IRVING MARDER
Appellant, Pro Se
46 Fletcher Ave.
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[6] See Sturges & Burn Mfg. Co. v. Pastel 301 Ill. 253, cited by Denver v. Berger, supra.: Such statutory punishment was invalidated as denials of Trial, of Equal Protection of the laws and Due Process of law under the Federal Constitution.

Appendix

S-12,998

DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Commonwealth vs. *Irving Marder.*

CUTTER, J. The defendant was found guilty in the Municipal Court of the City of Boston of parking in Boston, on October 10, 1961, in violation of a city traffic rule. He was fined $25 and appealed to the Superior Court. There he filed a motion to dismiss on the grounds, among others, (1) that under regulations of the Boston Traffic Commission he would be subjected to a maximum fine of $3 on a first offence in one calendar year if he accepted "non-criminal disposition" of his case, whereas, if he insisted on a judicial determination, he would be exposed to the possibility of a maximum fine of $25 or $50 on such a first offence, depending upon his total prior record of traffic violations in all years; (2) that if he insisted on a judicial determination of his guilt he would have a criminal record, whereas he would not have such a record if he acknowledged his violation; and (3) that the provisions of G.L. c. 90, §§20 and 20A, taken together, intimidate defendants and deter them from insisting upon a trial. The motion asserted that the statutes, permitting noncriminal disposition of parking offences on a potentially more favorable basis than disposition by judicial determination, unconstitutionally denied him the equal protection of the laws and due process of law. The defendant's motion was denied. He again was found guilty and fined $25.

The pertinent statutes are set out in part in the margin.[1]

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[1] General Laws c. 90, § 20 (as amended through St. 1956, c. 389, § 3), reads in part: "Any person convicted of a violation of any provision of this chapter the punishment for which is not otherwise provided . . . shall be punished by a fine of not more than twenty-five dollars for the first offence . . ." We assume, although the meager

General Laws c. 90, § 20A, is designed to establish a simple and convenient procedure for the disposition, on essentially an administrative basis, of charged violations of motor vehicle parking regulations. It was first adopted by St. 1934, c. 368, § 1, and has been frequently amended. Prior to its initial adoption there was prolonged legislative study and

record does not clearly establish this, that the defendant was fined $25 under § 20. General Laws c. 90, § 20A (as amended through St. 1961, c. 455, § 6), reads in part: "It shall be the duty of any police officer who takes cognizance of a violation of any provision of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city . . . empowered . . . to make such rules or regulations therein, forthwith to give to the offender a notice to appear before the clerk of the district court having jurisdiction . . .

"Any person [so] notified to appear before the clerk of a . . . court . . . may appear before such clerk and confess the offence charged, either personally or through an agent duly authorized in writing or by mailing to such clerk, with the notice, the fine provided herein . . . [For the following sentences of § 20A, see St. 1961, c. 233, § 1. After a schedule of fines the following language appears.] provided, however, that . . . this sentence shall not apply to any offense . . . committed in . . . Boston . . . but for such an offense, payment of the fine established therefor by the Boston traffic commission . . . shall operate as a final disposition of the case . . . Proceedings under this paragraph shall not be deemed criminal; and no person notified to appear . . . as provided herein shall be required to report to any probation officer, and no record of the case shall be entered in the probation records. . . . [For the following sentence of § 20A, see St. 1953, c. 249, § 1.] Should any person notified to appear . . . fail to appear and, if a fine is provided . . . to pay the same, or having appeared desire not to avail himself of . . . the procedure established . . . the clerk shall . . . notify the officer concerned, who shall forthwith make a complaint and follow the procedure established for criminal cases. . . . [For the following sentence of § 20A, see St. 1961, c. 455, § 6.] The Boston traffic commission shall from time to time establish, . . . by rule or regulation, a schedule of fines for [such] offenses . . . committed in . . . Boston; provided, however, that the . . . commission shall not establish . . . any fine exceeding fifteen dollars."

This section has been amended since 1961, most recently by St. 1962, c. 786, §§ 1-5. The bill of exceptions does not show that the traffic commission regulations were introduced in evidence. They are not adequately set out in the record. See *Passanessi* v. *C. J. Maney Co. Inc.*, 340 Mass. 599, 604. Nevertheless, to avoid a succession of similar test cases, we have dealt with the question which the defendant attempted to raise by his motion.

investigation by other responsible bodies.[2] Its legislative history shows that it was enacted to relieve the burden placed upon the courts and the police in disposing of minor traffic violations under the usual criminal procedure and to free violators, many of whose violations are trivial and inadvertent, from inconvenience disproportionate to the gravity of their offence.

Under the amended legislation, the right to a judicial determination whether an offence has been committed is carefully preserved. In the event of a finding of not guilty under § 20, of course, no penalty is imposed. If a defendant is found guilty, § 20 contains no requirement that the sentencing judge impose the maximum penalty. He may take into account the degree of seriousness of the violation and may place the case on file or impose a wide range of penalties up to the maximum, some of which may be less burdensome than the schedule of penalties available pursuant to § 20A. The noncriminal disposition under § 20A recognizes the fact, of ordinary experience in this motorized age, that most violators of such traffic regulations, even if the violations are inadvertent, recognize that they have committed a violation and prefer to pay a minor penalty without argument and inconvenience.

The noncriminal method of enforcement permitted by § 20A, as an alternative to criminal proceedings under § 20, is essentially a sensible, simple, administrative method of making necessary traffic rules effective, without clogging the courts, causing undue public inconvenience and resent-

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[2] See Res. 1926, c. 37; 2d Report of the Judicial Council, 1926 Pub. Doc. No. 144, pp. 14, 24; 4th Report of the Judicial Council, 1928 Pub. Doc. No. 144, pp. 37-41, 75-78; Res. 1929, c. 45; Special Report of the Department of Public Works, 1930 Senate Doc. No. 5; Report of the Special Crime Commission, 1934 Senate Doc. No. 125, pp. 168-171, 220-223. See discussion of this and similar statutes in Note, 20 Mass. L. Q. (No. 1) 118; Warren, Traffic Courts, 56-65; Fisher, People's Court, 37-38. Cf. Economos, Traffic Court Procedure and Administration, 79-81.

ment, or depriving any citizen of full opportunity at his option for a judicial determination of facts. It is open to all citizens on the same basis and constitutes a reasonable classification of minor offences for special administrative treatment. In the case of more serious offences, there might well be force to the defendant's contention that the risks of a more serious penalty and criminal record upon a criminal disposition (as under § 20) would tend improperly to coerce admission, in an administrative proceeding (as under § 20A), of a guilt which did not exist. Compare, as to more serious offences, *Waley* v. *Johnston*, 316 U.S. 101, 104; *Euziere* v. *United States*, 249 F.2d 293, 294-295 (10th Cir.); *Heideman* v. *United States*, 281 F.2d 805, 808-809 (8th Cir.). Cf. also *Letters* v. *Commonwealth*, *ante*, [a]; *Teller* v. *United States*, 263 F.2d 871, 872 (6th Cir.). It will be time enough to consider that question when and if the Legislature attempts to deal with more serious offences by a procedure similar to § 20A. We hold now (1) that the procedure with respect to parking offences authorized by § 20A cannot be said to be unreasonable or discriminatory, either generally or as applied to this defendant, (2) that § 20A has not been shown to be an improper method of carrying out the obvious legislative purpose or beyond the powers of the Legislature (see *General Elec. Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, 675; *Commonwealth* v. *Chamberlain*, 343 Mass. 49, 51; *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.*, 344 Mass. 695, 700, and (3) that no facts appear indicating that by § 20A this defendant has been denied due process of law.

The defendant has invited our attention to *Berger* v. *Denver*, 142 Colo. 72, 75, in which, upon a somewhat different statute, a majority of the Colorado court (over a strong dissent) reached a conclusion in some respects incon-

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[a] Mass. Adv. Sh. (1963).

sistent with the result reached in this opinion. We are not prepared to follow that decision.

Exceptions overruled.

SUPREME JUDICIAL COURT
Boston 8, Massachusetts

December 24, 1963

Mr. Irving Marder
46 Fletcher Avenue
Lexington, Massachusetts 02173

Re: *Commonwealth* v. *Marder* Law No. S-12,998

Dear Sir:

Your letter to the Chief Justice concerning the above case has been referred to me as the senior justice participating in the decision and I answer it in behalf of the members of the court who joined in the opinion. Your motion to dismiss (R. 1-2) did not specifically refer to the Constitution of the United States. Nevertheless, despite the form of your motion, the opinion of the court (Mass. Adv. Sh. [1963] 1051, 1052, 1054) ruled, and was intended to rule, that G. L. c. 90, §§ 20 and 20A, as amended, and as applied to the facts of record, was valid and constitutional under the Fourteenth Amendment of the Federal Constitution as well as under comparable provisions of the Constitution of the Commonwealth.

You may present this letter to the Supreme Court of the United States in any appropriate manner, if you feel that to do so will make more certain what issues were decided.

Yours sincerely,

(s) JOHN V. SPALDING
Associate Justice

Copy to:
GARRETT H. BYRNE, ESQ.
District Attorney
MURRAY P. REISER, ESQ.
Assistant District Attorney
Suffolk County Court House
Boston, Massachusetts 02108

MASS. GENERAL LAWS

Chapter 90 S. 20 Penalties and Punishments. Any person convicted of a violation of any provision of this chapter the punishment for which is not otherwise provided, . . . shall be punished by a fine of not more than twenty-five dollars for the first offence, . . .

Chapter 90 S. 20A Non-Criminal Disposition of Charges for Violation of Motor Vehicle Parking Rules, Regulations, Etc.—It shall be the duty of any police officer who takes cognizance of a violation of any provision of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city or town or by any commission or body empowered by law to make such rules and regulations therein, forthwith to give to the offender a notice to appear before the clerk of the district court having jurisdiction, . . .

Any person notified to appear before the clerk of a district court as provided herein may appear before such clerk and confess the offence charged, either personally or through an agent duly authorized in writing or by mailing to such clerk, with the notice, the fine provided herein . . . [After a schedule of Fines for the cities and towns] provided, however, that the provisions of this sentence shall not apply to any offense subject to this section committed in the city of Boston . . .; but for such an offense, payment of the fine established therefor by the Boston traffic commission . . . , as the case may be, shall operate as a final disposition of the case. . . .

. . . Proceedings under this paragraph shall not be deemed criminal; and no person notified to appear before the clerk of a district court as provided herein shall be

required to report to any probation officer, and no record of the case shall be entered in the probation records.

Should any person notified to appear hereunder fail to appear and, if a fine is provided hereunder, to pay the same, or having appeared desire not to avail himself of the benefits of the procedure established by this section, the clerk shall as soon as may be notify the officer concerned, who shall forthwith make a complaint and follow the procedure established for criminal cases. . . .

The Boston traffic commission shall from time to time establish, with the approval of the city council of Boston, in accordance with the provisions of the charter of said city, by rule or regulation, a schedule of fines for offenses subject to this section committed in the city of Boston; provided, however, that the Boston traffic commission shall not establish under the provisions of this paragraph any fine exceeding fifteen dollars. . . .

Boston Traffic Commission
Traffic Rules and Regulations[1]

ARTICLE X

Section 1. *Penalties*

Whoever violates any of the provisions of the foregoing rules and regulations, or whoever violates any temporary or experimental rules and regulations made under authority

---

[1] The Powers of the Boston Traffic Commission derive from the Acts, 1929-Chapter 263 as follows . . .

Section 2. The commission shall have exclusive authority except as otherwise herein provided, to adopt, amend, alter and repeal rules and regulations, not inconsistent with general law as modified by this act, relative to vehicular street traffic in the city, and to the movement, stopping or standing of vehicles . . . may prescribe penalties not exceeding fifty dollars for the violation of any rule or regulation adopted hereunder. . . .

of Section 1 of Article IX shall be punished by a fine not exceeding fifty (50) dollars for each offence, except as otherwise provided by statute.

[2]Section 1A *Schedule of Fines for the Non-Criminal Disposition of Parking Violations.*

(2) The fine the payment of which shall operate under Section 20A of Chapter 90 of the General Laws as a final disposition of an offense subject to said section committed in the City of Boston shall be as follows:

A. In Downtown Boston.

(b) For every other such offense so committed-

(i) If it is the first, second or third other such offense so committed in any one calendar year- Three Dollars.

[2] The schedule of fines applicable at the time were set by the Boston Traffic Commission and approved by the Boston City Council on June 26, 1961—Proceedings of the Boston City Council p. 143-144; 147-148.

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In the Supreme Court of the United States

OCTOBER TERM 1963

No. 819

IRVING MARDER,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

APPEAL FROM THE SUPERIOR COURT
OF SUFFOLK COUNTY, MASSACHUSETTS

OPPOSITION TO MOTION TO DISMISS APPEAL

IRVING MARDER
Appellant, Pro Se
46 Fletcher Ave.
Lexington, Mass. 02173

Blanchard Printing Company, Boston, Mass. — Law Printers

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Supreme Court of the United States

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OPPOSITION TO MOTION TO DISMISS APPEAL

I. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE TIMELY AND PROPERLY RAISED.

There are two ways in which a Federal question can be raised so that it is properly before the United States Supreme Court on appeal under 28 U.S.C.A. Sec. 1257 (2). One way is for it to be raised in the trial court "with fair precision and in due time" or in some manner showing the "clear intendment" of the Appellant.

> "... No particular form of words or phrases is essential, but only that the claim of invalidity and the

ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented . . ."

Bryant v. *Zimmerman* (1928) 278 U.S. 63, 67.

The other way is for it to be apparent from the opinion of the appellate court that the question was considered by it.

Charlestown Association v. *Alderson* (1944) 324 U.S. 180, 185, 186
Harding v. *Illinois* (1904) 196 U.S. 78, 85-88.

Your appellant contends that, in substance if not by specific words of art, and in essense if not by number, he did clearly raise his Federal constitutional objections with definite indications as to the nature of, and the basis for, such objections, when he was in the trial court.

See Motion to Dismiss in Jurisdictional Statement, p. 5, ¶2

". . . Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient . . ."

Dewey v. *Des Moines* (1898) 173 U.S. 193, 199;
See *Chicago, Burlington &c. . . R'd* v. *Chicago* (1896) 166 U.S. 226, 231, 232.

But if appellant acted inadequately to raise the federal question in the trial court, his inadequacy was cured by the Massachusetts Supreme Judicial Court in its opinion, wherein it recognized that he had, in said Motion, raised the questions of "Equal protection of the laws" and "Due process of law . . .".

Jurisdictional Statement p. 14

Thereby the Supreme Judicial Court made reference to the Federal Constitutional questions involved, if not by number at least by use of the specific phrases employed in such sections—phrases never specifically used, though embodying concepts undoubtedly envisaged, in the Massachusetts Constitution.

Bryant v. *Zimmerman* (1928) 278 U.S. 63, 69.
See *Puglisee* v. *Commonwealth* (1957) 335 Mass. 471, 474, 475; 140 NE 2d 476, 479.

In further support of Appellant's position, it is noted that there is now included with the record a letter or certificate on stationery of the Massachusetts Supreme Judicial Court, purporting to be written by one of its justices, at the referral of its Chief Justice, and "in behalf of the members of the court who joined in the opinion".

See Jurisdictional Statement, page 18.

This letter, which is as official and definite as could be reasonably required by any judicial body, positively states that the court opinion "rules, and was intended to rule, that G.L. c. 90, §§20 and 20A, as amended, and as applied to the facts of record, was valid and constitutional under the Fourteenth Amendment of the Federal Constitution as well as under comparable provisions of the Constitution of the Commonwealth."

See *Whitney* v. *California* (1926) 274 U.S. 357, 361.

There is nothing in Appellant's interpretation as to timely raising of the questions, or in the record itself, to indicate that the facts stated in the letter of the Supreme Judicial Court were incorrect or subject to question.

Although it is conceded that the Massachusetts Court's opinion, as expressed and as explained by the letter, makes no reference to the VIth Amendment, the opinion did deal with "right to trial".

See Jurisdictional Statement, p. 14, 16, 17.

It is not conceded that Appellant's Motion, made in the trial court, failed to raise this question by implication if not expressly. The right to trial, and suggestions of effective deprivation thereof, were clearly set forth in that motion at that early stage in the proceedings.

Jurisdictional Statement, p. 5, 6.

II. The Appeal Does Present a Substantial Federal Question.

Appellant believes that he has fully and adequately dealt with this topic in his Jurisdictional Statement, pages 8 to 13, and that none of the contentions of the Commonwealth, raised in the *Motion To Dismiss*, require additional response in this statement.

Conclusion

For the reasons set forth in the Jurisdictional Statement and this Opposition to the Motion to Dismiss it is prayed that this Court note probable jurisdiction.

Respectfully submitted,

Irving Marder
Appellant, Pro Se
46 Fletcher Ave.
Lexington, Mass. 02173

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Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 819.

IRVING MARDER,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS.

EDWARD W. BROOKE,
Attorney General of the
Commonwealth of Massachusetts,
Attorney for the Appellee.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 819.

IRVING MARDER,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS.

Now comes the Commonwealth of Massachusetts, appellee, and moves that this appeal be dismissed on the grounds that the federal questions sought to be reviewed were not timely or properly raised, and that said appeal does not present a substantial question.

Statement of the Case.

In October, 1961, the appellant was the owner of a motor scooter that was parked on Billerica Street in the City of Boston for a period exceeding the legal time limit set for that area. The appellant was summoned to appear before the Boston Municipal Court on the overtime-parking charge, and pleaded "not guilty" at the time of arraignment. He was accordingly tried, found guilty, and fined $25. The appellant then appealed, was placed on bail,

and given a trial *de novo* in the Superior Court. Prior to trial in the Superior Court the appellant moved for dismissal of the charges against him, as per the "Motion to Dismiss" excerpts of which appear at pages 5-6 of the Jurisdictional Statement, and which has been reprinted in full as Appendix A hereto. The motion was denied, and the appellant took an exception.

The appellant was then tried, again found guilty, and fined $25, with a stay of execution pending appeal to the Supreme Judicial Court. The decision of that Court, from which this appeal is taken, appears at pages 14-18 of the Jurisdictional Statement.

Questions Presented.

1. Will an appeal lie under 28 U.S.C. § 1257(2), when no provision of the Constitution of the United States was ever specifically referred to either in the opinion of the state court from which the appeal is taken or by the appellant in the proceedings prior thereto?

2. Is a law providing criminal penalties for certain motor-vehicle parking violations rendered unconstitutional under the Fourteenth Amendment to the Constitution of the United States by the existence of a supplementary law providing for noncriminal disposition of the same offenses for persons electing to plead guilty, pay fines fixed at less than the maximum criminal penalties, and avoid trial?

Reasons for Granting the Motion to Dismiss.

I. The Federal Questions Sought to be Reviewed were Not Timely or Properly Raised.

Review of state court decisions under 28 U.S.C. § 1257(2), is limited to specific federal questions, properly

raised. *Whitney* v. *California*, 274 U.S. 357, 362-363. *Dewey* v. *Des Moines*, 173 U.S. 193, 197-198. *Wilson* v. *Cook*, 327 U.S. 474, 483-484. *Adler* v. *Board of Education*, 342 U.S. 485, 496. In order for an appeal to be brought to this court under the above section, an objection to the validity of the relevant state statute must be taken before judgment in the trial court, and, if such objection is based upon the statute's being repugnant to the Constitution of the United States, the relevant section thereof must be specified. *Brown* v. *Massachusetts*, 144 U.S. 573, 579. Thus, references to the "Constitution of the United States" (*Herndon* v. *Georgia*, 295 U.S. 441, 442-443; *Harding* v. *Illinois*, 196 U.S. 78, 88; *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248); to the "Constitution and laws of the United States" (*Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 656); or to "due process of law" (*Bowe* v. *Scott*, 233 U.S. 658, 664-665) have all been held insufficient to sustain Supreme Court jurisdiction.

In the case at bar, no mention of any provision of the Federal Constitution appears in the appellant's Motion to Dismiss, nor is there any such reference in the opinion of the Supreme Judicial Court. The Motion to Dismiss contains the vague complaint that G.L. c. 90, §§ 20 and 20A, give rise to "unequal treatment under the law" and are therefore "unconstitutional." The phraseology is not that of the Fourteenth Amendment, and the concept of equality or equality of treatment could as readily be considered a reference to the Massachusetts Constitution.

> "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." (Constitution, Declaration of Rights, article 1.)

Under such circumstances the constitutional objection will be deemed to refer to the Massachusetts Constitution and not the Federal Constitution. *New York Central Railroad Co.* v. *New York*, 186 U.S. 269, 273 (1901). *Bowe* v. *Scott*, 233 U.S. 658, 665 (1913). *Bryant* v. *Zimmerman*, 278 U.S. 63, 67-68 (1928).

Nor was the Fourteenth Amendment, or any other provision of the Federal Constitution, ever mentioned in the opinion of the Supreme Judicial Court. In the holding of that Court, the provisions of G.L. c. 90, § 20A, are deemed to be neither unreasonable nor discriminatory, nor in any way depriving the appellant of "due process of law"—a concept solidly established in the Constitution of Massachusetts. Massachusetts Constitution, Declaration of Rights, article 12. *Lowell Gas Co.* v. *Department of Public Utilities* (1949), 324 Mass. 80, 84 N.E. 2d 811; certiorari denied, 338 U.S. 825, 70 S. Ct. 71. *Pugliese* v. *Commonwealth* (1956), 335 Mass. 471, 140 N.E. 2d 476.

In support of his contention that the Supreme Judicial Court considered the constitutional objection in the light of the Fourteenth Amendment, appellant submits a letter to that effect from Associate Justice John V. Spalding. The law on this point, however, is stated in *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 186, n. 1, as follows:

> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record . . . a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised."

In the instant case we have no certificate from either the court itself or from the presiding justice thereof. There is no authority whatsoever for giving any legal effect to a letter from an associate justice of the state court.

All of the above is applicable to the appellant's objection under the Fourteenth Amendment. No mention of or reference to the Sixth Amendment of any sort, however ambiguous, is to be found in either the Motion to Dismiss or in the opinion of the Supreme Judicial Court.

II. The Appeal does Not Present a Substantial Federal Question.

There is no contention by the appellant that G.L. c. 90, § 20, under which he was fined, would, standing alone, be unconstitutional. He urges, rather, that an otherwise constitutional criminal law somehow *becomes* unconstitutional by virtue of the existence of another law—*i.e.*, § 20A, which provides for expeditious, noncriminal disposal of the cases of those who choose to plead guilty. Such a system, taken as a whole, is claimed to violate the due process and equal protection clauses of the Fourteenth Amendment.

A. As to the appellant's contention that G.L. c. 90, §§ 20 and 20A, violate the due process clause of the Fourteenth Amendment:

This court has declared on more than one occasion that the state is the primary judge of regulations required in the interest of public safety, and its police statutes may only be declared unconstitutional when they are arbitrary and unreasonable attempts to exercise the authority vested in the state. *Graves v. Minnesota*, 272 U.S. 425, 428. *Holden v. Hardy*, 169 U.S. 366, 395.

Accordingly, the fixing of fines for the violation of state legislation is within the state's police powers, subject only

to the limitation that such fines must not be so grossly excessive as to amount to a deprivation of property without due process of law. *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111.

The appellant does not claim that a fine of $25 for his offense was in itself excessive. He complains, rather, that he was somehow deprived of his right to trial. Such a contention is unsupportable. The appellant had not one, but two, trials—an initial trial in the District Court and a trial *de novo* in Superior Court—and at both he was duly found guilty, and took appeal. Such a procedure can hardly be said to be lacking in due process.

B. As to the appellant's contention that G.L. c. 90, §§ 20 and 20A, violate the equal protection clause of the Fourteenth Amendment:

Appellant claims that the equal protection clause of the Fourteenth Amendment is violated because those pleading guilty under section 20A may receive more lenient treatment than those *found* guilty and fined under section 20. But the option of choosing whether to plead guilty and thus qualify under section 20A is open to all, and like treatment of all persons similarly situated is all that is required by the equal protection clause. *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U.S. 527, 537. Equal protection of the laws is not diminished by a law or course of procedure which would have been applied to any other person in the state under similar circumstances and conditions. *Tinsley* v. *Anderson*, 171 U.S. 101, 106. *Walston* v. *Nevin*, 128 U.S. 578, 582. *Lowe* v. *Kansas*, 163 U.S. 81, 88. *German Alliance Insurance Co.* v. *Hale*, 219 U.S. 307, 318.

Admittedly, persons electing to plead guilty under section 20A may be treated differently from those who are

tried, found guilty and fined under section 20. But such a classification does not run afoul of the equal protection clause unless capricious, arbitrary or unreasonable; *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527; *Walters* v. *City of St. Louis*, 347 U.S. 231, 237; and, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that, in the actual state of facts which surrounds its operation, its classifications lack rationality. *McGowan* v. *Maryland*, 366 U.S. 420, 425-428.

As pointed out in the opinion of the Supreme Judicial Court, section 20A was designed to establish "a simple and convenient procedure for the disposition, on essentially an administrative basis, of charged violations of motor vehicle parking regulations. . . . Its legislative history shows that it was enacted to relieve the burden placed upon the courts and the police in disposing of minor traffic violations under the usual criminal procedure and to free violators, many of whose violations are trivial and inadvertent, from inconvenience disproportionate to the gravity of their offence." *Commonwealth* v. *Marder*, 1963 Adv. Sh. 1052, 1053.

Such a purpose can hardly be called "arbitrary," "capricious" or "unreasonable." A classification having a reasonable basis does not offend against the equal protection clause merely because in practice it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79. *Morey* v. *Doud*, 354 U.S. 457, 465. A state may make different arrangements for trial under different circumstances of even the same class of offenses. *Graham* v. *West Virginia*, 224 U.S. 616, 630.

On the basis of the foregoing, it is submitted that no substantial question of law is presented by this appeal.

Conclusion.

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General of the
Commonwealth of Massachusetts,
Attorney for the Appellee.

Appendix A.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court for
Criminal Business
No. 1103

COMMONWEALTH

vs.

IRVING MARDER

MOTION TO DISMISS

Now comes the defendant and moves that the Honorable Court dismiss, quash and abate this action for the following reasons:

1. Under the regulations of the BOSTON TRAFFIC COMMISSION, approved by the BOSTON CITY COUNCIL, under powers set forth in G. L. Chapter 90, § 20 and § 20A, defendant is placed in a position where he may suffer a greater penalty if he insists on a hearing and judicial determination of guilt than if he confesses guilt. This is UNEQUAL treatment under the LAW and therefore UNCONSTITUTIONAL.

More specifically, with respect to the offense here charged, he would be exposed to a maximum fine of $3.00 on a first offense in one calendar year per vehicle parking record if he accepted "noncriminal disposition" of his case, whereas he would be exposed to a maximum fine of $25.00 to $50.00 on this "first" offense depending on a lifetime personal-driving-as-well-as-parking record IF he insisted on a hearing and judicial determination of guilt.

2. Under G. L. Chap. 90, § 20 and 20A, he must bear the onus of a criminal record if he is found guilty of violations after insisting upon a hearing and judicial determination of guilt; whereas he bears no criminal record if he

confesses guilt. This is UNEQUAL treatment under LAW and UNCONSTITUTIONAL.

3. The DISCRIMINATORY treatment under LAW resulting from the wordings of G. L. Chap. 90, § 20 and 20A effectively INTIMIDATES defendant from insisting upon trial. Likewise these discriminatory statutes tend to place a premium upon admission of guilt even in cases where it does not exist, making a mockery of our courts.

4. There are many reasons why a defendant might seek judicial trial. He might object to the process or method of service of process. He might object to the authority of the officer issuing process. He might object to a specific regulation as not being in accordance with the statute. Or, he might have any number of valid DEFENSES. He ought not to be placed in a position where he fears to raise such valid defenses lest he pay a high premium. In no other category of crime is such double standard endorsed as a matter of LAW. To endorse such DOUBLE STANDARD here would be a whittling away of judicial powers and individual rights long recognized under our constitutional form of government.

5. A FINE OR PENALTY should be based upon the nature of the offense committed, and not upon the nature of the judicial method adopted, or insisted upon, for determination of guilt. To the extent that the FINE OR PENALTY in the instant case would be determined on the latter basis, this principle is violated; and the statutes giving rise to such violation of a long accepted principle of justice are accordingly unconstitutional.

WHEREFORE defendant prays the HONORABLE COURT that this action based on invalid statutes be dismissed, quashed or otherwise abated.

Respectfully submitted,
IRVING MARDER
Pro Se